INDEX

	Page
Statement	2
Argument	5
Conclusion	6

CITATIONS

Cases:

Barr v. *Matteo*, 355 U.S. 171 6

United States v. *Borden Co.*, 308 U.S. 188 3

United States v. *Kniss & Marsters*, No. 762, October Term, 1961 ..... 2, 7

United States v. *Staley*, No. 882, October Term, 1961 ..... 2, 7

United States v. *Wayne Pump Co.*, 317 U.S. 200 3

United States v. *Wise*, No. 488, October Term, 1961 ..... 2, 4, 5, 6, 7

Statutes and Rules:

Clayton Act, 38 Stat. 736, 15 U.S.C. 12, et seq.:

Sec. 14 ..... 1, 2, 3

Criminal Appeals Act, 18 U.S.C. 3731 ..... 1, 3, 5

Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*:

Sec. 3 ..... 2, 3, 5

Federal Rules of Criminal Procedure:

Rule 7(c) 3

Rule 8(a) 3

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 162

UNITED STATES OF AMERICA, APPELLANT

v.

NELSON WOODSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

This appeal involves the validity of an order of the district court dismissing an indictment under the Sherman Act as to corporate officials, on the ground that they may be prosecuted only under Section 14 of the Clayton Act. The government appealed from that judgment to the court of appeals, which certified the case to this Court under 18 U.S.C. 3731. Appellees urge that the appeal should be dismissed, on the ground that in the court of appeals the government abandoned any challenge to the foregoing ruling

of the district court.[1] If, however, as we shall show, the government did not waive that point in the court of appeals, then the case is properly before this Court, and the judgment of dismissal should be summarily reversed on the authority of *United States* v. *Wise*, No. 488, O.T., 1961, decided June 25, 1962. See *United States* v. *Kniss & Marsters* and *United States* v. *Staley*, Nos. 762 and 882, O.T., 1961, decided June 25, 1962.

STATEMENT

On May 16, 1961 a single count indictment was returned charging eight corporations and six individual officers thereof with violating Section 3 of the Sherman Act, 15 U.S.C. 3. The individual defendants (appellees here) moved to dismiss the indictment as to them on the ground that they could not be prosecuted under Section 3 of the Sherman Act for acts performed in their capacity as corporate officials, because such acts were punishable only under Section 14 of the Clayton Act. In opposing these motions, the government argued that the individual defendants could be prosecuted under Section 3; but that in any event the indictment should not be dismissed as to them, because it alleged facts constituting a violation of Section 14 by them. Since miscitation of a

[1] Appellees alternatively urge (Motion to Dismiss or Affirm, p. 14) that "the ruling of the District Court * * * should be affirmed for the reasons stated by the appellee in the *Wise* case." On June 25, 1962, however, this Court held in *Wise*, No. 488, O.T., 1961, that corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in their corporate capacity.

statute in an indictment is not ground for dismissal unless a defendant can show prejudice (Rule 7(c) of the Federal Rules of Criminal Procedure), the government asserted that the indictment should be deemed to charge an offense against the individuals under Section 14.

The district court held that the individual defendants could not be indicted under Section 3 of the Sherman Act for acts performed in their representative capacity. It rejected the government's alternate argument that the indictment could be read as charging a violation of Section 3 by the corporations and Section 14 by the individual defendants, on the ground that such an interpretation would make the indictment duplicitous under Rule 8(a) of the Federal Rules of Criminal Procedure by charging two offenses in a single count. The court thereupon entered an order dismissing the indictment as to the individual defendants.

Because in the government's view the district court's ruling on duplicity was an independent, non-statutory ground for dismissal of the indictment, the government appealed under 18 U.S.C. 3731 to the Court of Appeals for the District of Columbia Circuit rather than to this Court. See *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *Wayne Pump Co.*, 317 U.S. 200, 208. In its notice of appeal the government appealed "from the * * * order dismissing the indictment against the individual defendants." However, because of the government's desire to obtain "an early determination of the duplicity question" (Reply Brief for Appellant, p. 5, n. 2), it

urged in its brief that the judgment of dismissal should be reversed upon that narrow ground, and did not argue the broader issue of liability under the Sherman Act, which was then pending before this Court in *United States* v. *Wise*, No. 488, October Term, 1961. The government stated in its main brief below (pp. 7–8 and fn. 2), that it "obviously believes that the District Court erred" on the statutory issue, and that if the court of appeals reversed on the duplicity ground, this would reinstate the indictment and leave it for the district court to determine, on the basis of this Court's decision in *Wise*, whether the appellees were charged under the Sherman or the Clayton Act. In its reply brief (pp. 4–5), the government further urged that if the court of appeals disagreed with its view of the lower court's ruling, the court's "duty under the express provisions of the Criminal Appeals Act" was to certify the case to this Court.

In a *per curiam* opinion issued on April 27, 1962, the court of appeals rejected the government's contention that the duplicity issue was properly presented for decision. It held that the district court's dismissal of the indictment "was based upon a construction of Section 3 of the Sherman Act, upon which the indictment was founded," and that "[a]ccording to the plain provision of the statute [Criminal Appeals Act], the Government might appeal from such a judgment 'direct to the Supreme Court of the United States.' In such circumstances, an appeal to this court is not authorized or permitted."

The opinion below, as originally filed, directed dismissal of the appeal for lack of jurisdiction. The

government then filed a Motion for Modification of Judgment and for Certification to the Supreme Court in which it pointed out that since the court of appeals had held that the only issue in the case was the construction of the Sherman Act, and since that issue had been raised by the government's appeal, the proper disposition under the Criminal Appeals Act was not dismissal, but certification to this Court.

Appellees strenuously opposed the motion. They urged that "the Government abandoned any right to review of the lower court's construction of the Sherman Act by failing to include that issue in its Statement of Points and its Statement of Questions Presented" (p. 5) and that "the Government has not properly raised any issue that may be reviewed by the Supreme Court" (p. 6).

The court of appeals granted the government's motion and modified its opinion to provide for certification of the case to this Court.

ARGUMENT

Appellees urge dismissal of the appeal on the ground that the government abandoned in the court of appeals its challenge to the ruling of the district court that corporate officials cannot be prosecuted under the Sherman Act for antitrust violations committed in their corporate capacities. Appellees made the identical argument in the court of appeals in opposing the government's motion to have the case certified to this Court. The court below rejected that argument when it certified the case. That court was the forum best qualified to ascertain whether the government had

waived a particular issue before it, and it correctly ruled that the government had not waived the point.

As set forth in the Statement, *supra*, the government urged the court of appeals to reverse on a narrow ground, since such reversal would avoid the need for reaching the broader statutory question which was then pending before this Court in *Wise*. But the government did not thereby explicitly or implicitly waive its contention that the district court had misinterpreted the Sherman Act in ruling that corporate officials could not be prosecuted thereunder. On the contrary, the government specifically pointed out that it "obviously believes that the District Court erred" in the latter ruling. It also noted that, if the court of appeals accepted the argument on the narrow duplicity point, the question whether appellees should be prosecuted under the Sherman Act or the Clayton Act would remain open in the district court, to be decided on the basis of this Court's decision in *Wise*. The government did not waive the statutory issue, which was then pressing in this Court in *Wise* and on which it had appealed to this Court in other cases (see *supra*, p. 2), merely because it urged the court of appeals to reverse the dismissal in this case on a narrower ground. Cf. *Barr* v. *Matteo*, 355 U.S. 171.

CONCLUSION

This appeal properly presents the issue whether corporate officials may be prosecuted under the Sherman Act for antitrust violations committed in their cor-

porate capacities. The district court's ruling that they may not be so prosecuted is contrary to this Court's holding in the *Wise* case, and the judgment of dismissal should be reversed on the authority of the latter decision. See the *Staley* and *Kniss* cases, *supra*, p. 2.

Respectfully submitted.

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